STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 301638 Saginaw Circuit Court
DUNCAN ERIC COLE, JR., Defendant-Appellant.	LC No. 09-033357-FC

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant was convicted of four counts of attempted murder, MCL 750.91, one count of arson of a dwelling house, MCL 750.72a, and one count of placing an offensive or injurious substance or compound on real property with intent to injure, MCL 750.209(1)(a). He was sentenced as a third habitual offender, MCL 769.11, to consecutive terms of 16 to 25 years for each of the attempted murder convictions, 16 to 40 years for the arson conviction, and 15 to 30 years for the offensive or injurious substance conviction. Defendant appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE/GREAT WEIGHT OF THE EVIDENCE

Defendant alleges that the attempted murder verdicts were not supported by sufficient evidence or, in the alternative, that the trial court erred in holding that the verdicts were not against the great weight of the evidence. When considering a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the trial court's grant or denial of a motion for new trial on the grounds that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). An abuse of discretion occurs when the decision results in an outcome outside the range of reasonable and principled outcomes. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009).

Defendant asserts that the evidence presented at trial shows unequivocally that defendant did not ignite the fire that consumed defendant's family home until after he saw that his wife,

nephew, and children were out of the house. Thus, defendant claims, the verdicts convicting him of attempted murder, which requires the intent to kill, *People v Graham*, 219 Mich App 707, 712; 558 NW2d 2 (1996), are based on insufficient evidence or are against the great weight of the evidence. We disagree.

Intent and premeditation may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Kanaan, supra*, at 619. All conflicts in the evidence must be resolved in favor of the prosecution. *Id*.

Here, defendant's wife testified that defendant lit the front porch on fire after he saw that she and the children were safe. However, defendant's nephew testified that his first view of flames was of flames *behind* defendant as they drove away. Additionally, the fire investigator opined that the fire at the rear of the house was lit first. This opinion was supported by the fact that the rear door to the house was secured, giving rise to an inference that the rear fire was started and then defendant came out the front and started the second fire. Although defendant presented the theory that he could have used his key to return and light the kitchen fire after lighting the porch fire, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400, 614 NW2d 78 (2000); *People v Chapo*, 283 Mich App 360, 363-364, 770 NW2d 68 (2009). There was also evidence that defendant poured gasoline around his victims, coming so close to his wife that gasoline may have gotten on her. Also, defendant had made statements that he had "hurt them," that he had "killed them," and when asked why he started the fire, that he "wanted to kill everyone."

The jury could infer that defendant lit the kitchen fire first, while his wife and children were still in the house or while he did not know that they had escaped, and that he intended the fire to spread to them, accelerated by the gasoline he poured around them. A rational factfinder could conclude that defendant had intentionally placed the gasoline and lit the fire in a way that was designed to kill, not merely frighten. See *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986). The crime of attempted murder would have been complete if defendant took the overt act of lighting the fire in the kitchen with the intent to kill his wife, children and nephew. *Id.* Taken in the light most favorable to the prosecution, this evidence was sufficient to allow a rational fact-finder to determine that defendant had an intent to kill his wife and children when he lit the fire.

Similarly, the trial court's denial of defendant's motion for a new trial based on the great weight of the evidence was not an abuse of discretion. Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Defendant asserts that the statements he made about hurting or killing the victims were impeached by his wife's eyewitness testimony. Issues of witness credibility are generally insufficient grounds for granting a new trial. *Lemmon*, 456 Mich at 643. In any event, this conflict does not create "a real concern that

an innocent person may have been convicted" such that "it would be a manifest injustice" to allow the guilty verdict to stand. *Id.* at 644. The jury was presented with evidence that supported the theory that defendant lit the fire while his family was in the house, that he placed gasoline all around them, and that he did so with an intent to kill them.

II. EXCLUSION OF EVIDENCE

Defendant argues that the trial court committed error requiring reversal by sustaining the prosecution's objections to testimony that a detective had prepared a mental health commitment for defendant and that defendant had previously overdosed. A trial court's decision whether to admit evidence is reviewed by this Court for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606, 786 NW2d 579 (2010). A preliminary issue of law regarding admissibility is reviewed de novo. *Id.*

Defendant admits that our Supreme Court abolished the affirmative defense of "diminished capacity" in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001). Despite this admission, defendant argues that, although the defense of diminished capacity is not available, he still should have been able to offer this evidence to show that he lacked the specific intent to murder. This is precisely what is proscribed by *Carpenter*. "[T]he Legislature's enactment of a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation demonstrates the Legislature's intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id.* at 236 (emphasis in original). See also *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008).

Defendant's constitutional challenge to the trial court's ruling is without merit. A state is free to choose whether to adopt or depart from the common-law defense of diminished capacity. *Carpenter*, 464 Mich at 240, citing *Fisher v United States*, 328 US 463, 470, 476; 66 S Ct 1318; 90 L Ed 1382 (1946).

III. SCORING OF OV 9

Defendant also argues that the trial court erred in scoring Offense Variable 9 at 25 points. Under MCL 777.39(1)(b), 25 points are to be scored if ten or more victims were placed in danger of injury or loss of life. Defendant claims that the trial court erred in determining that the firefighters who responded to the blaze and searched the house for occupants could be counted. He argues that if they were placed in danger of injury or loss of life by the attempted murder, the crime scored, it was not until after the offense had been completed.

Defendant relies on *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), in arguing that the responding firefighters could not be counted because the crime scored was complete before they were placed in any danger. Defendant misapprehends *McGraw*. Although the firefighters were not "present" when defendant lit the fire, it was their response to that act, rather than any further acts by defendant, that placed their lives in danger. Persons who intervene after the fact may be considered a victim. See *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

The evidence indicated that the firefighters entered the building before the fire was fully extinguished and that the building was full of smoke, necessitating the use of protective gear. The evidence thus supports the trial court's finding that the firefighters that conducted the initial search were placed at risk of injury or loss of life. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant asserts that his trial counsel provided ineffective assistance. The right to counsel guaranteed by the United States and Michigan Constitutions is the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *US v Cronic*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984); *People v Pubrat,* 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), cert den 552 US 1071 (2007). The cumulative effect of several minor errors can warrant reversal even when the individual errors would not. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). Counsel's performance is presumed to fall within the wide range of reasonable professional assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Counsel's performance must be measured against an objective standard of reasonableness without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009).

Defendant first asserts that his trial counsel was ineffective in not moving to suppress statements he made to an officer at the hospital. When asked where he lived, he said "On Harrison, I burnt that bitch down" and "Yeah, I burned that motherfucker." He also admitted that he poured gasoline through his home and lit it with his lighter, and when asked why, responded that "he wanted to kill everyone—he wanted to kill everyone, and if he goes to jail he'll kill everyone there, too." However, counsel's failure was not based on incompetence, but on a reasonable judgment that the motion would not succeed. Although counsel stated that perhaps, in hindsight, he should have filed the motion, his performance must be measured against an objective standard of reasonableness without the benefit of hindsight. *Payne*, 285 Mich App at 188. We conclude that the trial court, after applying the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), correctly determined that the statement was properly admitted because there was a voluntary, knowing, and intelligent waiver of defendant's Fifth Amendment rights. See *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Defendant alleges only that he was intoxicated and "psychotic" at the time he made the statements. Although it is undisputed that defendant was intoxicated at the time he made the statements, intoxication is not an automatic bar to a determination that a defendant knowingly, voluntarily, and intelligently waived his *Miranda*[1] rights. The officer testified that defendant had

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

calmed down somewhat, was able to hold a conversation, and was not unclear or hesitant in his responses. As for any psychosis, defendant provided no proof that he was ever determined to be in a psychotic state at the time of the questioning or otherwise. Defendant's counsel was not required to raise futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Similarly, counsel's decision not to call certain witnesses was a matter of trial strategy. Defendant argues that he should have called witnesses who would have testified that he was suicidal on the night in question. One also might have contradicted a claim that he was not shouting in the emergency room on the night in question. Counsel determined that the evidence would have been cumulative. There was other testimony that defendant was suicidal and an officer had testified that defendant was "visibly agitated" at the hospital. Moreover, a report indicating that defendant was shouting in the emergency room was also introduced. To show that defendant was prejudiced by his counsel's failure to call witnesses, "[i]t must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Here, it is clear that counsel's decision was based upon reasonable investigation and was based on trial strategy, i.e., avoiding the needless presentation of cumulative evidence. See *Payne*, 285 Mich App at 190. Such a decision did not deprive defendant of a substantial defense. *Id.*

Finally, Michigan law prohibits the defense of voluntary intoxication apart from a narrow exception for legally obtained and properly used medication. MCL 768.37. Defendant was thus not entitled to a jury instruction on this defense. The failure to request it therefore did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad